P.E.R.C. NO. 2020-17

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WARREN HILLS REGIONAL
BOARD OF EDUCATION,

Respondent/Cross-Movant,

-and- Docket No. CO-2019-021

WARREN HILLS REGIONAL
EDUCATION ASSOCIATION,

Charging Party/Movant.

SYNOPSIS

The Public Employment Relations Commission partially grants a motion for summary judgment filed by the Warren Hills Regional Education Association and partially denies a cross-motion for summary judgment filed by the Warren Hills Regional Board of Education. The Association's unfair practice charge alleges that the Board violated N.J.S.A. 34:13A-5.4a(1), (3), and (5) when it eliminated full-time paraprofessional positions at the end of the 2017-2018 school year. The Commission finds that the Board unilaterally reduced the work hours of the full-time paraprofessionals thereby eliminating the need for healthcare coverage. The Commission concludes that the Board's actions breached the negotiations obligations of N.J.S.A. 34:13A-5.3 and violated N.J.S.A. 34:13A-5.4a(5), and derivatively, N.J.S.A. 34:13A-5.4a(1). However, the Commission finds that the Association has not established a violation of N.J.S.A. 34:13A-5.4a(3) and dismisses that charge.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Respondent, Schenk, Price, Smith, and King, attorneys (Mark H. Zitomer, Of Counsel)

For the Charging Party, Oxfeld Cohen, attorneys (Sanford R. Oxfeld, Of Counsel)

DECISION

This case comes to us on a motion for summary judgment filed by Charging Party Warren Hills Regional Education Association (Association) and a cross-motion for summary judgment filed by Respondent Warren Hills Regional Board of Education (Board).

On July 7, 2018, the Association filed an unfair practice charge, which, as amended September 27, 2018, alleged that the Board engaged in unfair practices proscribed by the New Jersey Employer-Employee Relations Act as amended, specifically

N.J.S.A. 34:13A-5.4a(1), (3), and (5).[1/] The charge, as amended, makes these allegations, summarized below:

- The Association represents permanent paraprofessionals employed by the District.
- Full time paraprofessionals were advised by letter dated May 4, 2018, that they would be losing their position at the end of the 2017-18 school year. They were invited to apply for part-time paraprofessional positions.
- The Association sought to meet with the Board to address the Board's claim that the reduction of hours was motivated by economics.
- The district did not respond to the invitation and terminated the majority of full-time paraprofessionals.

The Association seeks to have the paraprofessionals made whole by restoring their income and benefits and returning them to full-time hours pending negotiations. It seeks an order directing the Board to negotiate with the Association and reach agreement on any reduction of full-time positions to part-time.

1/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act"; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. and "(5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employees in that unit, or refusing to process grievances presented by the majority representative."

On October 2, 2018, a Complaint and Notice of Hearing was issued and the case was assigned to a Hearing Examiner.

On April 1, and May 17, 2019, respectively, the Association and Board filed their motion and cross-motion, supported by briefs, affidavits or certifications, and exhibits.[2/] On June 3, 2019, pursuant to N.J.A.C. 19:14-4.8(a), the Commission Chair referred the motions to the Commission, as opposed to the assigned hearing examiner, for determination.

Summary judgment will be granted if there are no material facts in dispute and the moving party is entitled to relief as a matter of law. We follow the standards established by the courts in resolving summary judgment applications. See Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995); Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73-75 (1954).[3/]

2/ The Association's reply to the Board's cross-motion was filed out of time and is not part of the record.

3/ N.J.A.C. 19:14-4.8(e) provides:

> If it appears from the pleadings, together with the briefs, affidavits and other documents filed, that there exists no genuine issue of material fact and that the movant or cross-movant is entitled to its requested relief as a matter of law, the motion or cross-motion for summary judgment may be granted and the requested relief may be ordered.

Each party asserts that there are no material facts in dispute and that it is entitled to judgment as a matter of law.[4/]

The Board operates a regional, secondary school district consisting of a middle school and a high school. The Association is the majority representative for certificated instructional and non-instructional staff and other categories of employees including paraprofessionals, who are non-tenured employees. At the time the charge was filed, the most recent collective negotiations agreement (CNA) between the Board and the Association had a term of July 1, 2015 through June 30, 2018. They were engaged in collective negotiations for a successor agreement.[5/] These facts are uncontested.

1. During the 2017-2018 school year, the Board employed 40 paraprofessionals. Seven paraprofessionals worked 7 hours per day, were deemed full-time, and received health benefits as they

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4/ The Association supported its motion with exhibits and an affidavit filed by former full-time paraprofessional Patricia Wintersteen. Part of her affidavit refers to alleged settlement offers made by the Board. Offers to compromise or settle a disputed claim are not admissible to establish liability. See N.J. Rule Evidence 408; Kas Oriental Rugs, Inc. v. Ellman, 394 N.J. Super. 278, 288-289 (App. Div. 2007). Thus, we do not consider ¶s32 and 34 of the Wintersteen affidavit. The Board submitted exhibits and the certification of Superintendent Earl C. Clymer, III, in support of its cross-motion.

5/ As set forth in the certification of the Superintendent, on January 28, 2019, the partes reached agreement on a successor CNA to cover the period from July 1, 2018 through June 30, 2021. The successor CNA is attached to the Superintendent's certification.

worked 30 or more hours per week. The daily hours for another seven paraprofessionals were 4.06 hours and two worked 3.85 hours. The other 24 paraprofessionals worked 5.67 hours a day.[6/]

2. At a negotiations session on May 2, 2018, Board representatives informed the Association that after the current school year ended, it would no longer employ full-time paraprofessionals. All such positions would be part-time.[7/]

3. On May 3, 2018, the seven full-time paraprofessionals received letters dated May 4 that their full-time positions would not be renewed for the succeeding school year.[8/] The letters advised that they could apply for a part-time paraprofessional position and provided information as to continuing health coverage through COBRA.[9/]

4. After the full time paraprofessionals requested a statement of reasons for their terminations, the Board secretary issued identical letters dated May 30, 2018.[10/] After noting that

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6/ Clymer certification ¶s 9 & 10, and Exhibit B. Clymer also certifies (¶12) that of 33 paraprofessionals employed during the 2016-2017 school year, six were full-time, working seven hours a day.

7/ Clymer certification, ¶s 16 & 17.

8/ Wintersteen affidavit, ¶12, Exhibit 6.

9/ COBRA (the Consolidated Omnibus Budget Reconciliation Act) is a federal law that allows employees who have lost their jobs or had their hours reduced, to remain under their employer's health care coverage for a period of time and then purchase the coverage.

10/ Wintersteen affidavit, ¶15, Exhibits 8 & 9.

part-time paraprofessional positions were available, the letters asserted:

> Over the years, the school district has discussed and reconfigured the scheduling and assignments of its paraprofessional staffing. While a few paraprofessionals have remained in full time positions, the vast majority of the paraprofessional staff are part-time. After review and consideration, the change is deemed warranted for reasons of economy, efficiency, flexibility in scheduling, reducing the use of paraprofessionals who are unfamiliar with the particular assignment or students when there are absences and vacancies and other good cause.

5. On May 22, 2018, a grievance was filed with Assistant Superintendent Annette G. Walters.[11/] It states it was submitted on behalf of four of the full-time paraprofessionals who had received notice that their positions would be terminated.[12/] Wintersteen signed the grievance as "Representative for the WH Paraprofessional Unit." The grievance asserted: the elimination

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11/ Wintersteen affidavit, Exhibit 11. Walters is also identified in documents and certifications as holding various positions including special services director. Wintersteen's affidavit states that Walters is the supervisor of the paraprofessionals involved in this dispute. In a grievance response to Wintersteen dated May 31, 2018, Walters identifies herself as "Assistant Superintendent for Personnel, Guidance, and Special Education."

12/ Of the other three full-time paraprofessionals working in the 2017 to 2018 school year, one retired and one accepted a full-time secretarial position. Clymer's certification (¶23) asserts that the remaining full time paraprofessional accepted a part-time paraprofessional position. The Wintersteen affidavit (¶36) asserts that the third full-time paraprofessional "quit."

of the full-time positions should have been negotiated with the Association; the Board acted in bad faith; and that to the extent the eliminations were based on job performance, the Board had not evaluated the full-time paraprofessionals.

6. On May 30, 2018, Wintersteen notified Clymer that the grievance was being moved to the Superintendent's level.[13/]

7. On May 31, 2018 Walters responded to Wintersteen:

> I am in receipt of a letter dated May 30, 2018 about an administrative grievance. I am confused and perplexed. Ari Eisner is the president of the [Association]. I thought Mrs. Teresa Fahy was the Grievance Officer.
>
> When and where in the WHREA CBA does it state that paraprofessionals have their own bargaining unit? You have signed this document as the representative of the WH Paraprofessional Unit, is this to suggest that paraprofessionals within the Warren Hills Regional School District have their own unit?
>
> If you wish to file a grievance, I would refer you to the WHREA CBA and encourage you to file the proper steps and chain of command.[14/]

13/ Wintersteen affidavit, Exhibit 13

14/ Wintersteen affidavit, Exhibit 14. The grievance procedure allows grievances to be filed, and under certain circumstances pursued, by individual employees. However, Article XX.D.2., provides:

> When a grievant is not represented by the Association . . . the Association shall, if the grievance is processed above Level One, be notified that the grievance is in process, have the right to have a representative present during further meetings with the grievant thereon, present its position in writing and receive a copy of the decision rendered thereon.

8. By letter dated June 13, 2018, Superintendent Clymer denied the grievance, and on June 14, Wintersteen submitted it to the Board of Education.[15/]

9. A letter dated June 5, 2018 was sent by the Association's attorney to the Board's attorney asserting:

- By eliminating full-time positions to avoid paying for health insurance, the Board was violating PERC precedent;
- The hours of paraprofessionals were controlled by the needs of their assigned students which included students requiring full-time assistance. Thus the Board's action conflicted with that past practice;
- That the Board attorney had stated there would be "repercussions" for rejecting the Board's offer of a flat hourly rate for all paraprofessionals.[16/]

10. At various Board of Education meetings subsequent to June 5, 2018 that preceded the agreement on a new CNA, the Board hired paraprofessionals into 2018-2019 school year positions that specified "work weeks not to exceed 29 hours" and referred to hourly rates qualified by "pending negotiations."[17/]

15/ Wintersteen affidavit, Exhibits 19 and 20.

16/ Wintersteen affidavit, Exhibit 16

17/ Wintersteen affidavit, Exhibits 18, 21, 23, and 25. In one case a paraprofessional, previously an assistant librarian, was hired at a rate that was not subject to change pending negotiations. A notation implies that she would stay at her assistant librarian pay level.

11. None of the four former full-time paraprofessionals, on whose behalf the grievance was filed, sought part-time paraprofessional positions for the 2018 to 2019 school year. On August 14, 2018, the Board approved Wintersteen for a home instruction position, a job she had performed previously. But, Wintersteen alleges that she did not get home instruction work.[18/]

Arguments of the Parties

The Association argues that the Board eliminated the full-time positions simply to reduce their work hours below the threshold that qualified employees for health care coverage and not for any educational reasons. It points to statements made in connection with collective negotiations meetings as showing that the money saved from the elimination of the full-time jobs would be used toward pay raises for other unit members.

The Association cites a prior case between the same parties in which the Board attempted to subcontract jobs held by bus drivers employed by the Board.[19/] It also relies on interlocutory and final Commission decisions and court precedent holding that

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18/ Wintersteen affidavit, ¶31. Wintersteen also alleges that she was not rehired into extra-curricular coaching positions and that two of the other former paraprofessionals were not hired for 2018 summer positions that they had held in prior years.

19/ Warren Hills Reg. Bd. of Ed. and Warren Hills Reg. H.S. Ed. Ass'n, P.E.R.C. No. 2005-26, 30 NJPER 439 (¶145 2004), aff'd, 2005 N.J. Super. Unpub. LEXIS 78, 32 NJPER 8 (¶2 App. Div.), certif. den., 186 N.J. 609 (2006).

an employer's unilateral changes in work hours, including actions taken during the course of collective negotiations, violate the Act's duty to negotiate.[20/]

The Board asserts that educational reasons were behind its decision to eliminate all full-time paraprofessional positions and employ only part-time personnel in those jobs.

It maintains that because, both before and after its elimination of the full-time positions, the majority of paraprofessionals were part-time, it did not change working conditions.

The Board refers to Article VIII(I) of the CNA providing:

> Working hours of paraprofessionals shall be parallel to those of teachers with regard to starting time and the length of lunch periods. Paraprofessionals may leave the building without requesting permission during their scheduled duty free lunch period, but they must indicate they are leaving and return by notifying the main office staff. At the close of the school day, paraprofessionals may leave five minutes after the students' dismissal time. If a paraprofessional is required to stay beyond that time he/she will be paid at the rate defined in Article XX.A.2.

The Board contrasts this language with other contract terms specifically setting the work hours for other types of employees.

20/ Galloway Twp. Bd. of Educ. v. Galloway Twp. Ass'n of Educ. Secretaries, 78 N.J. 1 (1978); Boonton Board of Education, P.E.R.C. No. 2006-98, 32 NJPER 239 (¶98 2006); Clinton-Glen Gardner School District, I.R. No. 2014-1, 40 NJPER 121 (¶46 2013); Evesham Township Board of Education, I.R. No. 95-10, 21 NJPER 3 (¶26001 1994).

It argues that the dispute arises under the CNA and is not cognizable as an unfair practice charge.

The Board also asserts that as paraprofessionals do not have tenure it did not have to renew full-time paraprofessionals.

Alleged Violation of N.J.S.A. 34:13A-5.4a(5)

N.J.S.A. 34:13A-5.3 provides in pertinent part that:

> Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established.

In addition, N.J.S.A. 34:13A-33, a statute applicable to school districts, provides:

> Notwithstanding the expiration of a collective negotiations agreement, an impasse in negotiations, an exhaustion of the commission's impasse procedures, or the utilization or completion of the procedures required by this act, and notwithstanding any law or regulation to the contrary, no public employer, its representatives, or its agents shall unilaterally impose, modify, amend, delete or alter any terms and conditions of employment as set forth in the expired or expiring collective negotiations agreement, or unilaterally impose, modify, amend, delete, or alter any other negotiable terms and conditions of employment, without specific agreement of the majority representative.

A public employer that violates the statutory bar against unilaterally changing mandatorily negotiable terms and conditions of employment violates N.J.S.A. 34:13A-5.4a(5) and (1).

Review of the undisputed facts establishes that the reduction of the work hours, compensation and benefits of the

full-time paraprofessionals was a unilateral change in a mandatorily negotiable term and condition of employment.

During the 2016-2017 and the 2017-2018 school years, respectively, the Board employed six and seven full time paraprofessionals who received health benefits because they worked 30 or more hours per week. Their work day was 7 hrs.[21/]

The "non-renewal" letters dated May 4 given to the full-time paraprofessionals did not state that they were being separated from district employment but began with an invitation that they could apply for part-time paraprofessional positions.[22/] While the May 30, 2018 "Donaldson" letter[23/] from the Board secretary to Wintersteen cites "economy, efficiency and flexibility in scheduling" as the reason the Board did not renew Wintergreen's full-time position, we find it was the first of those reasons, economy in the form of eliminating health care coverage, that was the predominant motivation.[24/] In the minutes of its June 5, 2018 meeting, showing the employment of 26 paraprofessionals for the 2018-2019 school year, in every case, the notation "not to exceed

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21/ Finding of Fact No. 1, n.6

22/ Finding of Fact No. 3, Wintersteen affidavit, ¶12 exhibit 6.

23/ A non-tenured school employee who is not renewed is entitled to a statement of reasons from the board of education pursuant to Donaldson v. Board of Education of City of North Wildwood, 65 N.J. 236 (1974).

24/ That letter "encourages" Wintersteen to apply for a part-time job.

29 hours" appears.[25/] Other paraprofessionals with the same or fewer work hours were subsequently hired. The Board did not negotiate, nor reach agreement, with the Association before making these changes.[26/]

In Piscataway Tp. Bd. of Ed. and Piscataway Principals Ass'n, P.E.R.C. No. 77-65, 3 NJPER 169 (1977) and P.E.R.C. No. 77-37, 3 NJPER 72 (1977), aff'd, 164 N.J. Super. 98 (App. Div. 1978), the Board unilaterally cut the work year of four elementary school principals from 12 months to 10 months and reduced their salaries. The Commission's decision fully addresses why the Board's action violated its statutory duty to negotiate:

> N.J.S.A. 34:13A-5.3 . . . prohibits the modification of working conditions without prior negotiations [and] contemplates those terms and conditions of employment not established by a current contract and is not intended to permit a party to a contract to ignore the obligations of a negotiated agreement merely by offering to negotiate, or by indicating a willingness to negotiate the effect of unilateral conduct which contravenes the status quo of the contract. The Commission finds that where there is an agreement in effect, normal principles of

25/ Clymer's certification, ¶10 and ¶12, recites that in 2017-2018, 24 paraprofessionals worked 5.67 hours per day and in 2016-2017, 22 paraprofessionals worked 5.75 hours per day. These figures extrapolate, respectively, to work weeks of 28.35 and 28.75 hours, just short of 29 hours.

26/ Cf. Mastriani and Anderson 2 Labor And Employment Arbitration § 47.03, n. 27 (2019) (reductions in work year and work hours usually negotiable).

> contract law would seem to prohibit changes in terms and conditions of employment without the mutual agreement of the parties to that negotiations agreement.
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> [P.E.R.C. No. 77-65, 3 NJPER at 172]

In affirming the Commission, the Appellate Division of the Superior Court elaborated:

> The Board here argues that economy motivated the action complained of and that there is no material difference between the Board's right to cut staff and the right to cut months of service of staff personnel where the economy motive is common to both exercises. We disagree. While cutting staff pursuant to N.J.S.A. 18A:28-9 would be permissible unilaterally without prior negotiation, . . . there cannot be the slightest doubt that cutting the work year, with the consequence of reducing annual compensation of retained personnel who customarily, and under the existing contract, work the full year (subject to normal vacations), and without prior negotiation with the employees affected, is in violation of both the text and the spirit of the Employer-Employee Relations Act. Cf. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25 (1978).
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> [164 N.J. Super. at 100 to 101; some citations omitted]

See also Galloway Twp. Bd. of Educ. v. Galloway Twp. Ass'n of Educ. Secretaries, supra (Board violated statutory duty to negotiate through unilateral reduction in work hours and compensation of clerical employees); Hackettstown Bd. of Ed. and Hackettstown Ed. Ass'n, P.E.R.C. No. 80-139, 6 NJPER 263 (¶11124 1980) aff'd, NJPER Supp.2d 108 (¶89 App. Div. 1982), certif. den., 89 N.J. 429 (1982) (abolition of 12 and 11 month positions

and creation of new 10 month positions did not relieve Board of its obligation to negotiate);[27/] New Brunswick Bd. of Ed. v. New Brunswick Ed. Ass'n, Inc., P.E.R.C. No. 78-47, 4 NJPER 84 (¶4040 1978), recon. den., P.E.R.C. No. 78-56, 4 NJPER 156 (¶4073 1978), aff'd NJPER Supp.2d 60 (¶42 App. Div. 1979) (reduction of work year from 11 to 10 months with reduced pay for month worked during summer was mandatorily negotiable); E. Brunswick Bd. of Ed. and E. Brunswick Ed. Ass'n, P.E.R.C. No. 82-111, 8 NJPER 320 (¶13145 1982) (Board violated its duty to negotiate when, during collective negotiations with the Association, it abolished 12-month guidance counselor positions and unilaterally created the same positions as 10 month jobs). Cf. In re North Hudson Reg'l Fire & Rescue, 2015 N.J. Super. Unpub. LEXIS 438 (App. Div. 2015), aff'g P.E.R.C. No. 2013-83, 40 NJPER 32 (¶13 2013)(citing Piscataway in holding that employer's unilateral alteration of terminal leave payment schedule was an unfair practice).

Taken together these statutes and precedents hold that a public employer is obligated to negotiate with the majority representative of its employees before changing the work hours

27/ The Board did not directly appeal the Commission's Hackettstown ruling but instead sought to set aside a subsequent arbitration award. The appeals court noted its agreement with the Commission's determination.

and benefits of positions in the collective negotiations unit.[28/] This principle applies whether the contract is silent, contains language defining the hours and benefits, stems from past practice, or exists at the start of a collective negotiations relationship.

Acting unilaterally violates N.J.S.A. 34:13A-5.3, and a school employer making such a change during the course of collective negotiations for a successor agreement is an act specifically proscribed by N.J.S.A. 34:13A-33. See Willingboro Bd. of Educ. v. Willingboro Educ. Ass'n, 2015 N.J. Super. Unpub. LEXIS 1276 n.2 (App. Div. 2015). Doing so is an unfair practice proscribed by N.J.S.A. 34:13A-5.4a(5) and derivatively N.J.S.A. 34:13A-5.4a(1).

The Board denies that it violated its statutory duty to negotiate, arguing it engaged in lawful "hard bargaining."[29/] The cases cited by the Board where unfair practice charges were dismissed, or a complaint was not issued, do not involve the

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28/ This case differs from Borough of Keyport and International Union of Operating Engineers, Local 68, P.E.R.C. No. 2011-20, 36 NJPER 343 (¶133 2010), rev'd in part, aff'd in part, 39 NJPER 315 (¶108 App. Div. 2013), aff'd as modf'd, 222 N.J. 314, (2015), as the context of this dispute does not involve a fiscal crisis, nor do any administrative regulations factor into the negotiability analysis.

29/ It cites State v. Coun. of N.J. State Coll. Locals, 141 N.J. Super. 470 (App. Div. 1976) and other Commission decisions holding that failure to agree on contract terms does not amount to bad faith bargaining.

unilateral imposition of terms and conditions of employment. In several cases the Commission concluded that no meeting of the minds or agreement had occurred regarding negotiations proposals. They are distinguishable from this dispute where the Board unilaterally cut working hours and, as a consequence, those positions lost health care coverage.

We have found violations of the Act's obligation to negotiate in cases with substantially similar facts. See Boonton Bd. of Ed., P.E.R.C. No. 2006-98, 32 NJPER 239 (¶98 2006) (reduction in number of full-time teaching assistant positions and increase in number of part-time positions, eliminating fringe benefits); City of Newark, P.E.R.C. No. 94-118, 20 NJPER 276 (¶25140 1994)(employer did not have managerial prerogative to reduce recreation leaders' work hours from 40 to 20 per week, thereby reducing their salaries and eliminating their health benefits). See also Butler Board of Education, I.R. No. 2011-24, 36 NJPER 464 (¶181 2010) (reduction in hours making employees ineligible for health insurance provided grounds for injunctive relief).

We reject the Board's defenses asserting that the charge should be deferred to arbitration [30/] and relying on the non-

30/ Where an employer maintains that it made a unilateral change in a non-negotiable subject, resolving the dispute through the grievance procedure is not appropriate, especially where, as the Board observes here, the CNA does not address the work hours of the positions in dispute.

tenured status of the paraprofessionals.[31/] The Board's tenure argument blurs the difference between whether a specific employee should continue in a job and the principle that a majority representative represents that position, whoever occupies it, and has the right to negotiate over its terms and conditions of employment. See Galloway Twp. Bd. of Educ. v. Galloway Twp. Ass'n of Educ. Secretaries, supra., 78 N.J. at 17-19 (1978) (resignations of full-time secretaries after unilateral cut in work hours did not affect Association's right to represent those jobs). It is undisputed that during both the 2016-2017 and 2017-2018 school year there were full-time paraprofessional positions whose holders received health coverage. That represents the status quo which the Board unilaterally changed. The Board cites no contract language or authority for its theory that, when the majority of positions are part-time, it may eliminate full-time jobs.[32/] The absence of specific language describing the work hours and/or benefits of the full-time paraprofessionals did not

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31/ While paraprofessionals are not tenured they have statutory "just cause" protection against arbitrary job dismissals. See N.J.S.A. 18A:27-10.3

32/ In Piscataway, supra, the Commission and the court held that the Board committed an unfair practice even though it cut the working hours of four positions, and not those of all administrators in the unit. See 164 N.J. Super. at 100 (Board reduced the yearly employment term of a "number of members").

give the Board license to change the working conditions of those jobs.

Given the facts of this dispute we find that the Board's assertions that it cut the full-time positions for reasons other than economic savings realized from eliminating the affected employees' health care coverage is a pretext. Accordingly, we conclude that the undisputed facts demonstrate that the Board's unilateral elimination of the full-time paraprofessional positions breached the negotiations obligations of N.J.S.A. 34:13A-5.3 and N.J.S.A. 34:13A-33, thus violating N.J.S.A. 34:13A-5.4a(5) and derivatively, N.J.S.A. 34:13A-5.4a(1)[33/]

Alleged Violation of N.J.S.A. 34:13A-5.4a(3)

The amended charge added an allegation that the Board's action also violated N.J.S.A. 34:13A-5.4a(3).

Allegations of anti-union discrimination under N.J.S.A. 34:13A-5.4a(3) are governed by In re Bridgewater Tp., 95 N.J. 235, 240-245 (1984). Bridgewater established that the charging party must prove, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by

33/ The Supreme Court has held where an employer violates N.J.S.A. 34:13A-5.4a(5) by making unilateral changes in working conditions, such action also violates N.J.S.A. 34:13A-5.4a(1). Galloway Tp. Bd. of Ed v. Galloway Tp. Ed. Ass'n, 78 N.J. 25, 31, 51 (1978). See also Piscatway, supra, P.E.R.C. No. 77-65, 3 NJPER 172, n.5.

direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity, and the employer was hostile toward the exercise of the protected rights. If the employer did not present any evidence of a motive not illegal under our Act, or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct.

Here the Association argues that Wintersteen's filing of the grievance on May 22, 2018, on behalf of herself and three of the other formerly full-time paraprofessionals was protected conduct. As evidence of retaliation it lists:

- Two of the grievants were not rehired for summer 2018 paraprofessional jobs;
- Wintersteen was not rehired into two coaching positions;
- Despite being hired for home instruction, Wintersteen was not assigned any home instruction students.

The Association ascribes hostility to protected conduct in the May 31, 2018 grievance response by Walters.[34/]

We conclude that the Association has not established a prima facie violation of N.J.S.A. 34:13A-5.4a(3) and we will grant the Board's cross-motion to dismiss this aspect of the complaint.

First, we note the record does not show that the initial grievance filing or the subsequent attempts to advance it through the additional steps of the grievance procedure were actions undertaken by the Association, the majority representative. N.J.S.A. 34:13A-5.4a(5) makes it an unfair practice for a public employer to refuse to process grievances "presented by the majority representative." (emphasis added). An individual employee has the right to submit his or her grievance to the first step of the procedure. Red Bank Reg'l Educ. Ass'n v. Red Bank Reg'l High Sch. Bd. of Educ., 78 N.J. 122 (1978). However, at the subsequent steps of the procedure, including arbitration, the majority representative controls the progress of the grievance absent clear language to the contrary in the CNA. D'Arrigo v. N.J. State Bd. of Mediation, 119 N.J. 74 (1990).

Here, the parties' CNA provides that for a grievance to advance beyond the initial step of the procedure, "the Association shall, if the grievance is processed above Level One,

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34/ See Finding of Fact No. 7, (Wintersteen affidavit, Exhibit 14).

be notified that the grievance is in process, have the right to have a representative present during further meetings with the grievant thereon, present its position in writing and receive a copy of the decision rendered thereon."

The record does not show that the majority representative was notified when Wintersteen first attempted to move the grievance to level Two. Exhibit 13 was not copied to any Association representative. Walter's May 31, 2018 response questioning the right of Wintersteen to file a grievance on behalf of herself and the three other former full-time paraprofessionals she purported to represent, was copied to Association officials.

We need not determine whether some or all of Wintersteen's grievance filings were protected as we find no link between those actions and the challenged personnel moves.

The personnel action that is challenged by the unfair practice charge is the reduction of the hours of the full-time paraprofessional positions and the removal of their eligibility for health care coverage.[35/] Although the paraprofessionals

35/ The charge does not mention: The non-hiring of two of the grievants into summer paraprofessional jobs; Wintersteen not being rehired into two coaching positions; and her lack of assignments despite being rehired for home instruction. The Commission only considers unfair practice allegations that are specifically pled in a charge or an amendment thereto. See Brick Township Board of Education, P.E.R.C. No. 88-48, 13 NJPER 846 (¶18326 1987).

worked until June 30, 2018, they were given termination notices on May 4, 2018, prior to the grievance filing.

Thus the adverse personnel action, having occurred prior to any protected activity, provides no basis for holding that the record demonstrates the presence of the first two elements of Bridgewater.[36/]

We conclude that the Board's elimination of all full-time paraprofessional positions was a unilateral change in a mandatorily negotiable term and condition of employment, implemented during the course of collective negotiations violating the letter and spirit of N.J.S.A. 34:13A-5.3 and N.J.S.A. 34:13A-33. Thus, with regard to the portion of the unfair practice charge relating to N.J.S.A. 34:13A-5.4a(5) and derivatively N.J.S.A. 34:13A-5.4a(1), the Association's motion for summary judgment is granted and the Board's cross-motion for summary judgment is denied.

We also conclude that the Association has failed to prove that the facts of this case establish a violation of N.J.S.A. 34:13-5.4a(3), and dismiss that portion of the unfair practice charge. Thus, with regard to the portion of the unfair practice

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36/ Though the unfair practice charge was filed by the Association, it does not argue that the Board was hostile to the majority representative's exercise of its right to engage in collective negotiations. Unilateral action on a term and condition of employment is not per se evidence of anti-union discrimination. See Piscataway, P.E.R.C. No. 77-65, supra, 3 NJPER at 171.

charge relating to N.J.S.A. 34:13-5.4a(3), the Board's cross-motion for summary judgment is granted and the Association's motion for summary judgment is denied.

Typically, in a case where an employer has violated N.J.S.A. 34:13A-5.4a(5) and, derivatively, N.J.S.A. 34:13A-5.4a(1), by unilaterally making changes to mandatorily negotiable terms and conditions of employment, the remedy is to restore the status quo prior to the unilateral change. The record reflects that during the 2017-2018 school year, the Board employed seven full time paraprofessionals. However, the record also reflects that three of the seven employees who occupied those positions have moved on. The parties are in agreement that from those three employees, one retired and one accepted a full time secretarial position. There is a dispute as to whether the third employee quit or accepted a part time paraprofessional position. Therefore, we find it appropriate for the parties to engage in negotiations with regard to determining an appropriate remedy. If the parties do not reach agreement on an appropriate remedy within ninety days from receipt of this decision, this matter will be remanded to the Director of Unfair Practices for an evidentiary hearing which will be conducted only to ascertain the facts needed to determine an appropriate remedy to effectuate the purposes of the Act. We retain jurisdiction pending notice from the parties as to whether they have reached agreement on an appropriate remedy.

ORDER

A. We hereby Order that the Warren Hills Regional Board of Education cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by unilaterally reducing the weekly work hours and pay of full-time paraprofessional employees thus making them ineligible for contractual health benefits provided to employees who worked 30 or more hours per week;

2. Refusing to negotiate in good faith with the majority representative of employees in the appropriate unit, i.e. the Warren Hills Regional Education Association, concerning terms and conditions of employment in that unit, particularly, by reducing the weekly work hours and pay of full-time paraprofessional employees thus making them ineligible for contractual health benefits provided to employees who worked 30 or more hours per week.

B. The Warren Hills Regional Board of Education shall take the following affirmative action:

1. Negotiate in good faith and in accordance with the requirements of the New Jersey Employer-Employee Relations Act, with the Association over:

> (a). Any proposed change in the terms and conditions of employment of full-time paraprofessional positions; and

(b). An appropriate remedy to cure the Board's violations of the Act.

2. If the parties do not reach agreement on an appropriate remedy within ninety days from receipt of this decision, this matter will be remanded to the Director of Unfair Practices for an evidentiary hearing which will be conducted only to ascertain the facts needed to determine an appropriate remedy to effectuate the Act's purposes.

3. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of the notice, after being signed by the Board's authorized representative, shall be posted immediately and maintained by it for at least sixty consecutive days. Reasonable steps shall be taken to ensure that the notices are not altered, defaced or covered by other materials.

4. Within forty-five days of receipt of this decision, notify the Chairman of the steps it has taken to comply with this Order.

C. We retain jurisdiction pending notice from the parties as to whether they have reached agreement on an appropriate remedy.

D. The portion of the Complaint alleging that the Board violated N.J.S.A. 34:13A-5.4a(3) is dismissed.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Jones, Papero and Voos voted in favor of this decision. None opposed. Commissioner Bonanni recused himself.

ISSUED: October 31, 2019

Trenton, New Jersey

NOTICE TO EMPLOYEES

PURSUANT TO
AN ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION
AND IN ORDER TO EFFECTUATE THE POLICIES OF THE
NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,
AS AMENDED,

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by unilaterally reducing the weekly work hours and pay of full-time paraprofessional employees thus making them ineligible for contractual health benefits provided to employees who worked 30 or more hours per week.

WE WILL cease and desist from refusing to negotiate in good faith with the majority representative of employees in the appropriate unit, i.e. the Warren Hills Regional Education Association, concerning terms and conditions of employment in that unit, particularly, by reducing the weekly work hours and pay of full-time paraprofessional employees thus making them ineligible for contractual health benefits provided to employees who worked 30 or more hours per week.

WE WILL negotiate in good faith and in accordance with the requirements of the New Jersey Employer-Employee Relations Act, with the Association over: (a) Any proposed change in the terms and conditions of employment of full-time paraprofessional positions; and (b) An appropriate remedy to cure the Board's violations of the Act.

WE WILL advise the Commission whether an agreement has been reached on an appropriate remedy within ninety days from receipt of this order. If no agreement has been reached, this matter will be remanded to the Director of Unfair Practices for an evidentiary hearing which will be conducted only to ascertain the facts needed to determine an appropriate remedy to effectuate the Act's purposes.

Docket No. CO-2019-021

WARREN HILLS REGIONAL BOARD OF EDUCATION
(Public Employer)

Date: _____ By: _____

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, PO Box 429, Trenton, NJ 08625-0429 (609) 292-9830

APPENDIX "A"